United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1153

To be argued by
ELLIOT C. SAGOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1153

UNITED STATES OF AMERICA,
Appellee,

—v.—

CECIL ROBINSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Cecil Robinson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 5, 1976 after a seven day trial before the Honorable Frederick van Pelt Bryan, United States District Judge, and a jury.

Indictment 75 Cr. 776, filed August 4, 1975, charged Robinson and Edward Garris in Count One with conspiracy to commit bank robbery, in Count Two with bank robbery, and in Count Three with armed bank robbery in violation of Title 18, United States Code, Sections 371, 2113(a) and 2113(d), respectively.*

* That indictment superseded Indictment 75 Cr. 635 which named only Allen Simon as the bank robber. Defendant Garris has not been apprehended. A fourth man involved in the bank robbery, known as "Karim," has not been indicted or further identified.

Trial commenced against Robinson on January 21, 1976 and concluded on January 30, when he was found guilty on Count Two.* After the jury returned its guilty verdict on Count Two, Robinson moved, without objection from the Government, for dismissal of Counts One and Three, which was granted. On March 5, 1976 Robinson was sentenced to a term of 12 years' imprisonment under the provisions of Title 18, United States Code, Section 4208(a)(2), and is now serving that sentence.**

Statement of Facts

The Government's Case

On May 16, 1975, at approximately 10 A.M., four men, Alan Simon, Cecil Robinson, Edward Garris, and one "Karim," wielding loaded handguns and a sawed-off shotgun, robbed the branch of the Bankers Trust Company located at 177 East Broadway, New York, New York of approximately $10,000 in cash.

Simon, one of the robbers, testified for the government to the detailed planning for and actual commission of the robbery by the conspirators. Simon's testimony, and that of other witnesses, established that Simon and appellant Robinson, also known as "Merciful", were long-

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* Robinson's first trial in November 1975 before the Honorable Kevin T. Duffy resulted in a hung jury. The case was thereafter assigned to Judge Bryan.

** Prior to the trial Allen Simon, Robinson's co-conspirator, was sentenced by Judge Duffy to 18 years' imprisonment pursuant to his plea of guilty on Indictment 75 Cr. 635. Simon later testified as a government witness at the trial below. Following the trial, in February 1976, Judge Duffy granted Simon's motion pursuant to Rule 35, Fed. R. Crim. P., reducing Simon's sentence to ten years' imprisonment.

time friends;* that Garris, also known as "A.E." (or Allah Equality), and Robinson were also friends (Tr. 470, 479, 693, 773-83, 789);** and that after Robinson, Garris and Simon had agreed to rob a bank, Robinson suggested as the target the Bankers Trust Branch on East Broadway—a bank two blocks from Gouverneur Hospital where Robinson worked as a laboratory technician (Tr. 219, 451-53, 482-83). Robinson later introduced to the other conspirators a man identified only as "Karim". It was agreed by all that Karim would be the driver of the getaway car since none of the others could drive (Tr. 488, 521). Robinson also suggested that he and Karim wear white jackets, as did other hospital employees who frequented the bank, so that they would arouse no suspicion upon first entering the bank (Tr. 219, 408, 525).***

According to the plans, Simon was to use a shotgun and the others, Karim, Robinson and Garris, were to use .32 and .38 revolvers, which were thereafter procured for the robbery (Tr. 527-29, 534, 551). Prior to the bank robbery Robinson and Karim told Simon that Karim would obtain another car because allegedly Karim had wrecked his own vehicle (Tr. 520-21). On the day of the robbery, Karim and Robinson picked up Garris and Simon in a red 1974 Pontiac which was owned by one Otis Brown.**** According to Simon, Robinson that day

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* Although not learned by the jury, Robinson, Simon and Garris had met while they were inmates at Greenhaven—a New York State penal institution (Tr. of pre-trial conference, Jan. 19, 1976, pp. 54-63).

** "Tr." refers to pages of the trial transcript; "GX" to Government Exhibit; and "App. Br." to Robinson's brief on appeal.

*** The hospital records showed Robinson did not go to work as scheduled on the day of the robbery (Tr. 452; GX 6 and 6A).

**** Brown testified that his car had been stolen sometime prior to the date of the robbery, and identified Robinson as an acquaintance and classmate of his at Bronx Community College. Brown said that prior to the theft Robinson had ridden in his car a half dozen times in both the front and back (Tr. 344-54).

rode in the back of the Pontiac for different trips without his gloves on (Tr. 535-39, 543).

Upon their arrival at the bank, all four conspirators entered. Simon pulled out a sawed-off shotgun, and told the teller, "It's going down now" (Tr. 406), and further told everybody to "stand up" (Tr. 545). As Simon held the shotgun on the employees and customers, Robinson, who was wearing a white coat, a hat, a stocking cap under the hat, and gloves, stuffed a shopping bag with cash taken from the tellers' drawers. During the course of the robbery Karim, who also was wearing a white coat, shot and wounded a woman teller. He too looted the teller's drawers—the robbers' haul netting approximately $10,000. Garris, meanwhile, held a gun on a teller near the door to the bank (Tr. 211-222, 406, 428-29, 545, 548, 551, 572; GX 1).

Robinson, while behind the teller's counter in the bank emptying the cash drawers and when vaulting over the counter to leave the bank, was photographed several times by an activated surveillance camera placed near the entrance of the bank. The resulting photographs were introduced in evidence as Government Exhibit 1. The photographs were the result in part of Garris' failure to cover the camera with a pillow case as planned (Tr. 524, 526, 554).*

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* The camera took pictures of Simon, Karim and Robinson, but did not get any shots of Garris, who was standing near the entrance to the bank. None of the bank witnesses, all of whom were scared because of the shooting and the use of the shotgun, could make an identification of the robber with the hat (Robinson). Those witnesses were not asked either in or out of court if they could identify Robinson. The trial court did not permit the Government to elicit testimony from people who had seen Robinson on many occasions that the bank robber in the surveillance pictures (GX 1) was Robinson (Tr. 756-59).

The four men made good their escape in Brown's red 1974 Pontiac, which they abandoned about a mile from the bank. Later they divided the loot in Garris' apartment uptown (Tr. 551-55, 310).

Right after the bank robbery, an unidentified passer-by gave the police the license plate number of the get-away car, which was broadcast over the air. The car was spotted abandoned at 10:20 A.M., and turned over to FBI agents. Garris' fingerprint was identified on some papers found in the car and Robinson's fingerprint appeared on the right rear cigarette lighter panel (Tr. 294-319, 340, 366).*

On June 17, 1975 Simon was arrested by the FBI, and under questioning confessed to the bank robbery and named the other bank robbers, including Robinson. Thereafter, however, Simon refused to testify at a trial against his long time friends, Robinson and Garris—a position Simon maintained until he was sentenced to 18 years' imprisonment by Judge Duffy (Tr. 684-693).**

On July 25, 1975 Robinson was arrested for the instant bank robbery, and was found in possession of a .38 caliber revolver (Tr. 764-65).

Defendant's Case

Robinson did not take the stand, but called several bank employees present at the robbery in an apparent effort to demonstrate the deficiencies in the FBI's investigation by establishing the fact that the FBI never showed those witnesses a photo spread containing Robinson's photograph (App. Br. 10).

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* The FBI fingerprint expert, on cross-examination, could not say whether the print lifted on May 16, 1975 might not have been made a month or two earlier (Tr. 367-71).

** See p. 2 n.**, *supra*.

ARGUMENT

POINT I

The trial court properly admitted, solely on the issue of Robinson's identity as one of the bank robbers, oral testimony that two months after the robbery Robinson was arrested for that offense in possession of a .38 caliber handgun of the kind linked to the planning and commission of the robbery.

Robinson contends that the trial court erred in admitting Detective Clyde Foster's testimony that some two months after the robbery, and incident to Robinson's arrest for that offense, Detective Foster seized from Robinson's possession a .38 caliber handgun. Robinson, although acknowledging the other evidence linking one or more .38 caliber handguns to the planning and, inferentially, the commission of the robbery, and apparently conceding the relevance of Detective Foster's testimony of the seizure of a like gun upon his, Robinson's, arrest, asserts that the unfair prejudice of that testimony far outweighed its probative value and that, therefore, Judge Bryan abused his discretion in admitting it. Additionally, Robinson contends that reversal is required because Judge Bryan's limiting instructions to the jury regarding that evidence insufficiently advised the jurors of the limited purpose for which that evidence might be considered. The contentions are equally meritless.

The relevance of Detective Foster's challenged testimony can hardly be disputed. Other evidence established that by the night before the bank robbery the robbers had acquired three handguns: a .32 and a .38 revolver, and "one that looked like it might have been a .38" (Tr. 529). These weapons were to be used by Robinson,

Garris and Karim in the commission of the robbery. Handguns were in fact used during the course of the robbery, and Robinson handled one such gun while in the getaway car immediately after the robbery (Tr. 528-29, 534, 551, 884). Although the government was unable to prove that the .38 in Robinson's possession upon his arrest on July 25, 1975 was the very same gun that Simon saw the night before the robbery, or one of the guns actually used during the robbery, or the gun that Robinson handled in the getaway car, evidence of the seizure of the .38 caliber handgun from Robinson was probative of Robinson's "opportunity or preparation to commit the crime charged," and thus tended to prove his identity as one of the robbers. *United States* v. *Ravich*, 421 F.2d 1196, 1204 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *accord*, *United States* v. *Eatherton*, 519 F.2d 603, 611 (1st Cir. 1975); *United States* v. *Walters*, 477 F.2d 386 (9th Cir. 1973); *United States* v. *Fisher*, 455 F.2d 1101, 1103-04 (2d Cir. 1972); *United States* v. *Baker*, 419 F.2d 83, 86-87 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970). Indeed, since *Ravich*, wherein this Court held properly admissible physical evidence of weapons which clearly had not been used to commit the crime charged, the test of legal relevancy has been made even less stringent. *Compare United States* v. *Ravich*, *supra*, 421 F.2d at 1196-97 and n.7 *with* Rule 401 of the Federal Rules of Evidence.

Of necessity, Robinson's argument is reduced to the claim that the probative value of the challenged evidence was outweighed by the possibility of unfair prejudice to Robinson occasioned by its admission. This Court has said, however, that where the trial court has exercised its discretion and carefully balanced the competing interests, as Judge Bryan did here, the trial court's "determination will rarely be disturbed on appeal." *United*

States v. *Ravich*, *supra*, 421 F.2d at 1205; *United States* v. *Harvey*, 526 F.2d 529, 536 (2d Cir. 1975); *accord*, *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (U.S. Apr. 26, 1976).

Here, Judge Bryan, while admitting the challenged testimony, specifically prohibited the government from adducing in evidence the gun itself because he did not want "hardware on the table" (Tr. of pre-trial conference, Jan. 19, 1976, p. 68); nor did he permit the "gun [metaphorically] to be waved around in any sense of the word" (Tr. 753). The prosecution, for its part, carefully abided the trial court's prohibition and did not suggest, much less argue, that the evidence of Robinson's arrest while in possession of a single .38 handgun somehow marked him as a man of criminal character or disposition, who should therefore be convicted irrespective of his guilt or innocence of the crime charged.* Indeed, in commenting on the evidence of the seized gun in summation the prosecutor told the jury to "listen carefully . . . to Judge Bryan's charge. I will not tell you the significance of that item" (Tr. 891-92). In these circumstances, clearly the "probative weight was not overbalanced by the inflammatory tendency of the gun as evidence." *United States* v. *Wiener*, slip op. 2753, 2757, Dkt. No. 75-1218 (2d Cir. Mar. 24, 1976).

Robinson's claim that the court's charge effectively permitted the prosecution to use the challenged evidence to prove Robinson's general criminal character is simply belied by the court's admonishments to the jury to the contrary—much of the language of which Robinson

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* Indeed, the government adduced no evidence and made no argument that Robinson's possession of the .38 caliber handgun upon his arrest was unlawful.

chooses to ignore (App. Br. 27).* In his charge, Judge Bryan instructed the jury on the evidentiary value of the gun (Tr. 1007):

> "In certain instances evidence may be admitted for a particular, limited purpose only. Now, you have heard testimony about a .38 calibre hand gun which was found when the defendant was arrested on these charges, some two months after the robbery. That testimony was admitted for a very limited purpose. It may be considered only for whatever value, if any, it has on the issue of defendant's identity as one of the robbers, that is, on the question of whether this defendant was the person who committed the crimes charged. You may not draw any conclusions or inferences or engage in any speculations as to the defendant's character or reputation on the basis of this testimony or about anything else other than the narrow thing that I have just mentioned to you. You may

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* Robinson claims in error that the failure of Judge Bryan to give a limiting instruction at the time the gun was received was "plain error" (App. Br. 26). The cases he cites do not support his claim. Indeed, this Court has held that the failure to request a cautionary instruction to the jury on the use of "other crimes" evidence either at trial or at the close of the case in the charge to the jury precludes review on appeal of any error arising from any claimed right to such an instruction. *United States* v. *Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3608 (U.S. Apr. 26, 1976). Here, moreover, Robinson requested no such instruction at the time the evidence was advanced on the afternoon of January 27. Indeed, defense counsel made requests at the time the evidence was offered with respect to the court's anticipated "charge" (Tr. 755-56). The proper charge was given the very next morning on January 28. Under these circumstances there was no prejudice much less plain error in the absence of a limiting instruction immediately upon receipt of the challenged testimony regarding the gun.

consider this evidence solely for the limited purpose I have described and give it such weight, if any, for that purpose as you think it may deserve."

Judge Bryan's charge, which was adapted from the language in *Ravich* and *United States* v. *Eatherton*, *supra*, 519 F.2d at 612, was an accurate statement of the law and adequately limited the jury's use of that evidence to the issue of "defendant's identity as one of the robbers"—while enjoining the jury not to engage in "any speculation as to defendant's character or reputation."

POINT II

The trial court correctly found that the alleged failure of the government to provide Robinson with information already known to him and which was, in any event, immaterial did not constitute a *Brady* violation. The prosecutor's closing argument did not seek to exploit any such alleged violation by urging the jury to find facts the prosecutor then knew to be false.

Robinson contends that the government violated its duties under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by withholding from him until after the jury had commenced its deliberations knowledge of the fact that Simon and Brown, contrary to their trial testimony, had once been introduced to one another by their Muslim names, in Garris' presence; and, further, that the prosecutor exploited that *Brady* violation by arguing in summation that Robinson was the only one of the alleged bank robbers who knew Brown, the owner of the getaway car, and that therefore that car must have been acquired by the robbers through Robinson's efforts. In truth, however, neither Simon nor Brown testified falsely and the fact of their

solitary, casual introduction—a fact not deliberately withheld by the government—was presumably well known to Robinson since it was he who introduced those two to one another on the occasion in question. In these circumstances, Judge Bryan's finding that there had been no *Brady* violation whatever was clearly correct, and the submission of the allegedly withheld facts to the jury, by stipulation, during their deliberations gave to Robinson more than was required.

1. The Facts

Otis Brown, the owner of the getaway car, testified that sometime prior to the May 16 bank robbery his car had been stolen and that prior to the robbery he had never given the keys to anyone (Tr. 345).* Brown also testified that Robinson was his classmate, had worked with him at Harlem Hospital, and had ridden with him half a dozen times in his car in the spring of 1975. Brown was unable, however, to identify a photograph of Edward Garris as that of anyone he had ever seen,** and said, in response to a question, that he did not "know" an individual by the name of Allen Simon (Tr. 344, 354).

Allen Simon, contrary to Robinson's current assertions (App. Br. 27-28), did not testify that he did not know Otis Brown, the owner of the getaway car. Instead, the fair import of his testimony (and the only relevant response in the context of a second trial) was that he did not know at the time of the robbery the identity of the

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* Simon testified at trial that on the day of the robbery Garris was in possession of keys which were used to start up the car (Tr. 547).

** Carolyn Garcia, another witness who knew Garris very well, could not definitely identify Garris from the photograph shown to Brown (Tr. 777).

owner of the car that was to be used as the getaway vehicle * and that he had never seen that car prior to the day of the robbery. (Tr. 547).

In summation, the prosecutor argued, in effect, that of the conspirators only Robinson was a friend of Brown and knew of the existence and location of the latter's car, and that the use of that car as the getaway vehicle was no mere coincidence and implicated Robinson in the robbery.** In contrast, defense counsel argued, in part,

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* Simon's pertinent testimony, elicited on direct, was as follows (Tr. 537):

Q. Can you identify that picture? A. It looks like the car that came up.

Q. Had you ever seen that car before, before it came to the Garris house at 174 and Metcalf? A. No.

Q. Do you know who owned that car? A. No.

Q. All right. What happened then? The car came up.

* * *

Q. What happened then? A. We got into the car. We went over to Robinson's house.

** The prosecutor argued in pertinent part (Tr. 904-05):

"... [T]he important thing here is, which one of Simon's friends knew Otis Brown? Mr. Brown told you who. It was Mr. Robinson. Not only was he a friend; they were in the same program; they both were lab technicians uptown; they were both in the Public Service Career Program. They both attended Bronx Community College; they were in one of the same classes—history or writing—together. That we learned from Mr. Erdsneker, the registrar at Bronx Community College.

Who knew about the car? That's the point. Robinson had the get-away car or knew about the get-away car. Who might have known where that car was parked? Who would have known? Otis Brown told you the car was stolen. Who in the world would have known where the car was marked [sic]? Simon or Robinson.

You know, out of all the stolen cars that occur in the

[Footnote continued on following page]

that Garris, who was in a study program that Brown was in, "must have seen Brown's car" (Tr. 920, 789).

During their deliberations, the jury asked to have reread Brown's testimony dealing with his "relationship (knowledge) of Mr. Garris," and Blackwell's testimony on the "friendship between Mr. Garris and Mr. Robinson" (Tr. 1017).*

While the jury was deliberating, and as a result of the jury's note and questions asked of him by defense counsel, the prosecutor by telephone re-interviewed Simon. The next morning the prosecutor *sua sponte* brought to the attention of the court and defense counsel the information told to him by Simon the prior evening. That information, memorialized in a stipulation and later read to the jury during their deliberations, provided (Tr. 1035-36):

> Counsel have stipulated that if Mr. Simon were recalled to the stand, he would testify that in late 1974 he was once introduced to Otis Brown by Robinson on the ground floor of Harlem Hospital. Simon was introduced as Arova and the name "Simon" was not mentioned. Edward Garris was present at that introduction but was not introduced.

City of New York, out of all the stolen cars, this particular car was used in the bank robbery, and we know from incontrovertible evidence that Mr. Robinson's fingerprints are on it.

That is not a sheer coincidence. That's an impossible coincidence. It is no coincidence. He had been in the car on the day of the bank robbery."

* Joseph Blackwell, an employee of the New York City Human Resources Administration had testified that Garris and "Merciful," that is, Robinson, were friends and that he had seen them together on one occasion (Tr. 784-89).

> Simon would also testify that he saw Brown from a distance at Harlem Hospital on a subsequent occasion.

Additionally, the prosecutor told the court and counsel that Simon had told him this information on some earlier occasion but that he had had no recollection of the same until reminded of it by Simon during the prior evening's call. The prosecutor also advised Robinson's counsel, who advised the court, that at the first trial FBI agent McLaughlin, the case agent, had pointed out Brown to Simon while all three were standing in the vicinity of a courthouse corridor or witness room, identified Brown as the owner of the getaway car and asked Simon if he knew or had ever seen him. Simon replied that he had seen him once before—presumably at Harlem Hospital (Tr. 1023).

Based on the foregoing, Robinson asserted that the government had violated its *Brady* obligations and moved for a mistrial. That motion was denied by Judge Bryan who observed, "I see no *Brady* questions here at all" (Tr. 1028).

2. The Law

It is settled that the prosecutor is generally not held to a duty of disclosure of evidence already known to the defendant. *United States* v. *Stewart*, 513 F.2d 957 (2d Cir. 1975); *United States* v. *Brawer*, 496 F.2d 703 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States* v. *Purin*, 486 F.2d 1363 (2d Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); *United States* v. *Pollak*, 474 F.2d 828 (2d Cir. 1973); *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1937); *Xydas* v. *United States*, 445 F.2d 660 (D.C. Cir.), *cert. denied*, 404 U.S. 826 (1971); *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970).

Here, although Robinson on this appeal seeks to bury the fact, it is undisputed that it was he who made the solitary, casual introduction of Simon to Brown, by use of their Muslim names, in Garris' presence at Harlem Hospital. Robinson could readily have cross-examined Simon about his relationship with Garris and himself, and the fact of the introduction in question, but chose, perhaps for tactical reasons, not to do so.* Accordingly, even had the prosecution had in mind the fact of the solitary introduction in issue at some earlier time during trial, it would have been under no obligation to reveal the same to Robinson, who was himself "on notice of the essential facts." *United States* v. *Stewart*, *supra*, 513 F.2d at 960.

Further, this is not a case where the allegedly withheld fact would have revealed some putative falsity in the testimony of government witnesses Simon and Brown. Nowhere in Simon's testimony is there a denial that he had once met, and twice seen, Otis Brown.** His testimony that he did not "know" the owner of the getaway car was clearly addressed to his state of mind at the time of the robbery and accurate in any event. Similarly, Brown's inability to identify an apparently none too good photographic likeness of Garris (see, p. 11 n. * *, *supra*) is hardly surprising in view of the fact that on the single occasion they were in each other's presence, they were not even introduced to one another. Brown's testimony that he did not know an individual by the name of Allen Simon was of course accurate, as Robinson in effect concedes (Tr. 1025), since Robinson had identi-

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* As noted above, p. 3 n.*, Simon, Garris and Robinson knew one another from their days as inmates at a New York State penal institution.

** Robinson's assertion (App. Br. 28) that Simon and Brown had "twice met" is inaccurate.

fied Simon only as "Arova" when introducing him to Brown.

Equally importantly, the fact that Simon had once been introduced to Brown by Robinson in Garris' presence was thoroughly immaterial for *Brady* purposes. See *Moore* v. *Illinois*, 408 U.S. 786, 794-95 (1972); *United States* v. *Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). The critical fact, undiminished in any way by the allegedly withheld information, is that of the four alleged bank robbers only Robinson was a friend or acquaintance and schoolmate of Brown, and only Robinson was familiar with and had ridden in Brown's car. Indeed, if anything, the fact of the Harlem Hospital introduction was additional proof of association among Robinson, Simon and Garris favorable to the government—evidencing a relationship between Garris and Robinson which Robinson refused to stipulate to prior to trial (Tr. of pre-trial conference, Jan. 19, 1976, pp. 56-63), and about which government witness Blackwell testified (Tr. 388, 789).

Robinson's accusation that the prosecutor argued "a lie" in summation (App. Br. 28) is groundless. The challenged remarks did no more than accurately argue that of the alleged robbers it was Robinson—not Simon or Garris—who was a friend, classmate, and working colleague of Brown and who, in short, "knew" Brown; and that it was Robinson—not Simon or Garris—who on half a dozen occasions had ridden in Brown's car and knew where it was parked; and that in these circumstances, given the other evidence of Robinson's culpability, the robbers' use of Brown's car as the getaway vehicle could not have occurred in the absence of Robinson's complicity. Even had the prosecutor been aware at the time of his summation of the fact of the Harlem Hospital introduction—which he was not—recognition of that fact would

have required little or no change in the clear tenor and particulars of the argument as actually delivered.

Finally, any conceivable disadvantage to Robinson occasioned by his declination during trial to make use of information then well known to him was remedied by the submission to the jury by stipulation of those facts on which Robinson now relies, which were brought to the attention of the court and counsel by the prosecutor *sua sponte*.

POINT III

The prosecutor's summation was entirely proper.

Robinson contends that reversal is warranted because the prosecutor said in summation that the defense had presented no alibi, and did thereby impermissibly shift the burden of proof to the defense. The contention is meritless.

At trial, the government adduced various records of the hospital at which Robinson worked in May 1975, which evidenced that although scheduled to work on May 16, 1975, the date of the robbery, Robinson failed to appear at the hospital to do so. In summation the prosecutor observed, in the clear context of discussing the hospital records, that there was "no alibi presented in this case." *

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* The prosecutor argued in pertinent part (Tr. 886-87):

> Now, on May 16, 1975, just as on the previous Friday, the hospital record shows that Mr. Robinson again was not at the hospital, he was not signing into the hospital on this particular day. And for this particular day we have a more formalized work sheet. You remember that thing with the boxes crossed out. He was not in the hospital. You will know [sic] that there was no alibi presented in this case——

[Footnote continued on following page]

Robinson immediately objected, apparently to the use of the word "alibi," even before the prosecutor's statement had been completed. The court sustained the objection and enjoined the jury to disregard the challenged remark. At the close of the government's opening summation Robinson moved for a mistrial. He claimed that the prosecutor argued that "we haven't come forth with an alibi," and that "[i]t's like saying the defendant didn't testify." (Tr. 908). Robinson expressly declined to request a curative instruction (Tr. 909).

It is well settled that an unconstitutional comment on the failure of a defendant to testify can arise only when "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F.2d 168, 170 (10th Cir. 1955). *See United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). Here, the prosecutor's argument, which was interrupted in mid-sentence, was not intended to suggest, nor did it suggest, that Robinson had an obligation to produce any evidence. The challenged phrase was designed only to make plain that the hospital records adduced provided Robinson with no job-related alibi (Tr. 909, 1005).

Moreover, even if the intended limits of the prosecutor's remark were not correctly understood by the jury,

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Mr. Berman: Objection, your Honor.

The Court: Let us not talk about that at all.

The jury will disregard that as having nothing to do with the case, not a thing.

Go ahead.

Mr. Sagor: The hospital records indicate that Mr. Robinson had not signed in at the hospital, so he is not at his duly appointed place of appointment while the robbery was in progress.

no error resulted. Clearly, not only may an alibi be proved by documents and witnesses other than, such or in addition to, a defendant, but an alibi is almost invariably established through such other proof. Accordingly, the prosecutor's remarks here are not such that the jury would naturally and necessarily understand them to be a comment on Robinson's failure to testify. The cases relied on by Robinson for a contrary view are inapposite. None concerns an assertedly improper comment by the prosecutor on a defendant's failure to testify. Rather, each struck down a rule of law, as to which the jury was instructed by the court, which unconstitutionally shifted to a defendant some burden of proof.

Finally, any conceivable prejudice to Robinson was cured by the trial court's prompt curative instruction.

Robinson also argues that the prosecutor in summation made three other improper arguments, *viz.*, that defense counsel was an "expert cross examiner" with respect to Simon, that "Judge Bryan had believed Simon," and that there was "a thinly veiled comment on [defendant's] not having testified" (App. Br. 31). As to counsel's performance as an "expert cross examiner," the record does reveal an exhaustive examination of the government's chief witness, Simon. How such praise could be prejudicial to Robinson, as defense counsel apparently implies, is difficult to discern.

Furthermore, the transcript belies the exaggeration that the government actually argued that "Judge Bryan had believed Simon," * or made a "thinly veiled comment"

* The following argument was made (Tr. 895): "If you think for a minute that Mr. Simon is going to be rewarded for perjuring himself in this courtroom, you know he wouldn't be. You know he is not going to say something here and expected [sic] to be rewarded by Judge Duffy if it isn't true, Judge Duffy, who

[Footnote continued on following page]

about Robinson's failure to testify--to which alleged comment Robinson never objected (Tr. 900-01).* *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 796 (1976).

POINT IV

The trial court properly declined to reveal to counsel the precise contents of a lone dissenting juror's written request for advice, which would have revealed how the jury stood, where thereafter the court instructed the jury in open court in a fashion responsive to the juror's request.

Robinson contends that the trial court erred in declining to make known to him the precise contents of a lone dissenting juror's written request for advice because that conduct deprived him of an opportunity to urge on the court, in response to the note, a course of action other than that which the court chose. The contention is meritless.

The note in question was received in the following context. At 3:25 p.m. on the afternoon of the second day

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will know from Judge Bryan what happened in this courtroom." This argument is a variation of a common argument that a cooperating defendant whose sentence was deferred would hesitate to perjure himself before the sentencing judge. Such an argument focuses on the perception of the witness, not the court. Morover, in this case the argument was a fair response to Robinson's defense, in his opening and in his cross-examination of Simon, *i.e.* that Simon was currying favor with the government to reduce his sentence by "putting Robinson into" the robbery.

* The government said: ". . . if you look carefully at those photographs . . . you will see Cecil Robinson in these pictures. You will see him caught in the actual commission of the crime.

* * * * *

. . . Ladies and gentlemen, in this case if for one minute Mr. Robinson admits or Mr. Berman admits to Mr. Robinson being in the picture—because we know, it is uncontroverted, that that picture is the picture of the bank robber in this case, the man in the hat—then he can no longer deny it."

of jury deliberations, the jury sent in a note which said (Court Exhibit 8): "Your Honor we are deadlocked 11 to 1 for conviction on Count 2. We haven't attempted the other two counts. Please advise." The court read the note to counsel, omitting the precise count which the jury had volunteered (Tr. 1036). Shortly thereafter in open court the foreman confirmed that the jury was "hopelessly deadlocked." (Tr. 1038). Over Robinson's objection, the court then gave a modified "Allen" charge (Tr. 1038-40).

A couple of hours later the court received a note from the jury which is the subject of Robinson's claim of error. That note read: "Your Honor, regardless of honest efforts of my co-jurors to persuade me, I am unable to reach a decision without a strong, reasonable doubt. Can you advise me what to do? Mrs. R. Burton."* The court ordered the note sealed. At the end of the day, based in part on discussions with the court not on the record (Tr. 1040-41), both counsel requested that the jury continue to deliberate. The jury was sent home at 6:30 P.M. The next day the court repeated that a note had been received from a juror with regard to her state of mind and that in the note she asked for advice. Neither counsel knew the count of the jury, nor the precise content of the note. Over Robinson's objection with respect to its timing (Tr. 1042), the court then gave a further "Allen" charge (Tr. 1043-44). Robinson, however, never objected to the court's decision to seal the note, nor did he ever request that the court unseal that note so that he, Robinson, could assist the court in formulating a response. Accordingly, his current claim of error—premised on the court's decision to seal the note—is not properly before this court. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

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* This note is marked Court Exhibit 10, but it is referred to as Court Exhibit 9 in the transcript (Tr. 1040).

Even were this Court to reach the merits, Robinson is entitled to no relief and the cases on which he relies are clearly inapposite.* There was no impropriety in the decision to seal the note.** Robinson was simply not denied any meaningful opportunity to assist the court in formulating a response to the juror's request for advice—whatever may be his right to do so. His suggestion that he might have proposed in response to the note a supplementary instruction on reasonable doubt simply ignores the plain language of the note itself. The juror did not ask for an instruction on, or further clarification of the definition of, reasonable doubt. She asked for advice, and the court in well settled language told her to listen to her fellow jurors but not to give up any conscientious views.***

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* Robinson's reliance on *United States* v. *Dellinger*, 472 F.2d 340, 380 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) is misplaced. In *Dellinger* there were a series of out-of-court communications between the court and the jury of which no record was made, and as to which counsel were denied an opportunity to participate in formulating a response. 472 F.2d at 378. Here, in contrast, a record was made and the court delivered its response in open court—before which it conferred with counsel regarding the propriety of that response.

** The trial judge undoubtedly understood that by revealing Mrs. Burton's note, after the jury had earlier reported itself hopelessly deadlocked, he would have revealed to Robinson and counsel Mrs. Burton's status as the lone dissenting juror—thereby possibly aggravating for Mrs. Burton the sense of pressure she already no doubt felt.

*** Judge Bryan told the jury (Tr. 1043):

> "Last night I requested that you come in this morning again, because I thought this morning perhaps a fresh look at the situation might be useful.
>
> I also got a note from one of your members last evening, just as you were leaving. That person will not be identified, of course, here, and the only response that I can give to that note is to state again for you some of what I stated yesterday afternoon, that is, you should examine the ques-

[Footnote continued on following page]

Equally unavailing is Robinson's alternative assertion that he would have asked the court to declare a hung jury in response to the note. The court almost certainly knew that revealing the precise contents of the note would almost inevitably have elicited a motion from Robinson for a mistrial. The absence of an opportunity to make an explicit request for a mistrial simply could not have prejudiced Robinson, since the court had clearly determined to direct the jury to continue its deliberations—a a decision well within the court's discretionary power. *Haupt* v. *United States*, 330 U.S. 631 (1947); *United States* v. *Minieri*, 550, 556 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962). The court's decision here to give a further "Allen" charge, even in the face of a known 11-1 deadlock, was an appropriate exercise of its discretion and not coercive, given the length of the jury's deliberations. *United States* v. *Lee*, 509 F.2d 645, 646 (2d Cir.), *cert. denied*, 422 U.S. 1044 (1975); *United States* v. *Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States* v. *Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969).

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tions submitted to you with candor and with a proper regard for and deference to the opinions of one another; you should listen to one anothers' views with a disposition to be convinced.

That does not mean that you should give up any conscientious views that you hold, but it is your duty, after full deliberations, to agree upon a verdict, if you can do so without violating your individual judgment and your individual conscience.

That is all I can tell you at this time, so I am going to ask you to make another try this morning, and we will see what happens."

POINT V

The .38 caliber handgun was properly seized incident to Robinson's arrest.

Without citation to a single case, Robinson argues that the handgun seized incident to his arrest should have been suppressed because the complaint and affidavit which supported Robinson's arrest warrant did not adequately describe Robinson and resulted in the issuance of an unlawful general warrant. This claim is frivolous.

The affidavit prepared by Agent McLaughlin in support of an arrest warrant for "Cecil Robinson, a/k/a 'Merciful'", read in pertinent part as follows:

> 1. During an investigation in the course of official duties, it was learned from eyewitnesses and bank officials that on May 16, 1975, Banker's Trust Co., 177 East Broadway, New York, New York was robbed at gunpoint of approximately $12,049 by four armed men, and that the bank was then insured by the Federal Deposit Insurance Corporation.
>
> 2. Allen Simon, who has been indicted (75 Cr. 635) as one of the participants in the robbery described in the first paragraph, was shown by the deponent a bank surveillance photograph taken at the time of the robbery and identified one of the robbers as CECIL ROBINSON.
>
> 3. A complaint (Mag.'s No. 75-883) has been filed and an arrest warrant issued against Edward Garris as one of the participants in the robbery described in the first paragraph. Gilbert Garris, Edward Garris' brother, was shown by the deponent the same bank surveillance photograph re-

ferred to in the second paragraph, and identified the robber that Allen Simon identified as CECIL ROBINSON as his brother Edward's friend, known to Gilbert Garris as "Merciful."

Based on this affidavit, Judge Duffy ruled that the warrant adequately particularized the description of the defendant, since it named a man known not only as Cecil Robinson but also as "Merciful" (Tr. of Nov. 20, 1975 proceedings, p. 10).* Accordingly, Judge Duffy was clearly correct in finding that this was not a "general" warrant.

Ignoring totally this finding of Judge Duffy, Robinson speciously argues that the warrant was an unlawful "general warrant for anyone named Cecil Robinson." (Brief at 35). No matter how many Cecil Robinsons there might be—and we submit that there probably are not very many—the group narrows quite dramatically when the Cecil Robinsons must also be known by the name "Merciful."

While we believe that the warrant's description of the defendant satisfied any reasonable standard of particularity, the arrest of Robinson was valid for still another reason. A daytime arrest in a public place, such as occurred in the instant case, may be undertaken without a warrant so long as there is probable cause for the arrest of the defendant. See *United States* v. *Watson*, 96 S. Ct. 820 (1976). This principle is equally applicable when the officers are possessed of an arrest warrant which is defective, yet are aware of facts constituting probable

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* The naming of Robinson complied fully with Rule 4 of the Federal Rules of Criminal Procedure, which requires only that the warrant "contain the name of the defendant." Only if the defendant's name is unknown is a more particularized description required.

cause. See *Mayer* v. *Moeykens*, 494 F.2d 855, 858 (2d Cir.), *cert. denied*, 417 U.S. 926 (1974). Moreover, the arresting officers themselves need not be aware of all the facts constituting probable cause, so long as the collective knowledge of the law enforcement officers involved in the investigation satisfies the probable cause standard. See *United States* v. *Canieso*, 470 F.2d 1224, 1230 n.7 (2d Cir. 1972); *United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 753 (2d Cir. 1975). Here, since it appears to be undisputed that the affiant, Agent McLaughlin, was aware of a surveillance photograph in which Cecil Robinson was depicted, probable cause was clearly established. Agent McLaughlin's knowledge could quite properly be imputed to the arresting officer. See *United States* v. *Canieso*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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